

**NPS ARCHIVE  
1997.12  
CHRISTIAN, M.**

# **NAVAL POSTGRADUATE SCHOOL Monterey, California**



## **THESIS**

### **THE ROLE OF MEDIATION IN RESOLVING CONTRACT DISPUTES**

by

Michael C. Christian

December 1997

Thesis Advisor:

Mark W. Stone

Thesis  
C464

**Approved for public release; distribution is unlimited.**

DUDLEY KNOX LIBRARY  
NAVAL POSTGRADUATE SCHOOL  
MONTEREY CA 93943-5101

# REPORT DOCUMENTATION PAGE

Form Approved  
OMB No. 0704-0188

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188) Washington DC 20503.

1. AGENCY USE ONLY (Leave blank)

2. REPORT DATE  
December 1997

3. REPORT TYPE AND DATES COVERED  
Master's Thesis

4. TITLE AND SUBTITLE  
**THE ROLE OF MEDIATION IN RESOLVING CONTRACT DISPUTES**

5. FUNDING NUMBERS

6. AUTHOR(S)  
Christian, Michael C.

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)  
Naval Postgraduate School  
Monterey, CA 93943-5000

8. PERFORMING ORGANIZATION REPORT NUMBER

9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES)

10. SPONSORING / MONITORING AGENCY REPORT NUMBER

11. SUPPLEMENTARY NOTES

The views expressed in this thesis are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government.

12a. DISTRIBUTION / AVAILABILITY STATEMENT

Approved for public release; distribution is unlimited.

12b. DISTRIBUTION CODE

## 13. ABSTRACT

Mediation has emerged as a preferred ADR method among commercial organizations involved in contract disputes. However, its use by the Navy has been rare. Mediation has shown to provide benefits to its commercial users such as: improved business relations, time and cost savings, flexibility and adaptability and superior control over outcomes. This thesis provides information on mediation and examines the differences and similarities between how commercial organizations and the Navy use mediation. The goal is to improve the Navy's use of mediation to resolve contract disputes. This research found, through survey results and the literature review, that as commercial organizations increase their use of mediation, they become familiar with the process and tend to reach higher levels of process and outcome satisfaction, making them more likely to continue its use. In order for the Navy to improve its use of mediation, it should use outside agencies to provide training, use contract clauses requiring its use and selecting mediators with adequate technical and legal background.

14. SUBJECT TERMS

Mediation, Alternative dispute resolution, ADR, Contract Disputes

15. NUMBER OF PAGES  
123

16. PRICE CODE

17. SECURITY CLASSIFICATION OF REPORT  
Unclassified

18. SECURITY CLASSIFICATION OF THIS PAGE  
Unclassified

19. SECURITY CLASSIFICATION OF ABSTRACT  
Unclassified

20. LIMITATION OF ABSTRACT  
UL



**Approved for public release; distribution is unlimited**

**THE ROLE OF MEDIATION IN RESOLVING CONTRACT DISPUTES**

Michael C. Christian  
Captain, United States Marine Corps  
B.S., United States Naval Academy, 1992

Submitted in partial fulfillment of the  
requirements for the degree of

**MASTER OF SCIENCE IN MANAGEMENT**

from the

**NAVAL POSTGRADUATE SCHOOL  
December 1997**

NPS Archive  
1997.12  
Christian, m

~~Thesp~~  
~~C4/64~~  
~~C.2~~

## ABSTRACT

Mediation has emerged as a preferred ADR method among commercial organizations involved in contract disputes. However, its use by the Navy has been rare. Mediation has been shown to provide benefits to its commercial users such as: improved business relations, time and cost savings, flexibility and adaptability and superior control over outcomes. This thesis provides information on mediation and examines the differences and similarities between how commercial organizations and the Navy use mediation. The goal is to improve the Navy's use of mediation to resolve contract disputes. This research found, through survey results and the literature review, that as commercial organizations increase their use of mediation, they become familiar with the process and tend to reach higher levels of process and outcome satisfaction, making them more likely to continue its use. In order for the Navy to improve its use of mediation, it should use outside agencies to provide training, use contract clauses requiring its use and select mediators with adequate technical and legal background.





## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
A.	BACKGROUND.....	1
B.	OBJECTIVES.....	2
C.	RESEARCH QUESTIONS.....	3
	1. Primary Research Question.....	3
	2. Subsidiary Research Questions.....	3
D.	SCOPE.....	4
E.	LIMITATIONS.....	4
F.	ASSUMPTIONS.....	5
G.	METHODOLOGY.....	5
H.	ORGANIZATION OF THESIS.....	8
II.	BACKGROUND ON ALTERNATIVE DISPUTE RESOLUTION.....	11
A.	INTRODUCTION.....	11
B.	DEFINED.....	12
C.	REASONS FOR THE INCREASED USE OF ADR.....	13
D.	CONTRACT DISPUTE LEGISLATION.....	14
	1. Contract Disputes Act of 1978.....	15
	2. Administrative Dispute Resolution Act of 1990....	15

3.	Federal Agency Pledge.....	16
4.	Federal Acquisition Streamlining Act of 1994.....	17
5.	Executive Order 12979.....	17
6.	Executive Order 12988.....	18
7.	Administrative Dispute Resolution Act of 1996.....	18
8.	Agency Responses.....	19
E.	ADVANTAGES.....	20
F.	PROPER USE.....	21
G.	DISADVANTAGES.....	22
H.	IMPROPER USE.....	23
I.	SUMMARY OF CHAPTER.....	24
III.	MEDIATION.....	27
A.	INTRODUCTION.....	27
B.	BACKGROUND.....	28
C.	DEFINED.....	31
D.	ADVANTAGES.....	34
1.	Improved Relations.....	35
2.	Time Savings.....	37
3.	Cost Savings.....	40
4.	Flexibility and Adaptability.....	42
5.	Control.....	45

E.	DISADVANTAGES.....	49
F.	MEDIATION GUIDELINES.....	53
G.	FACTORS DETERMINING MEDIATION OUTCOME.....	54
1.	Procedure.....	54
2.	Mediator.....	57
H.	FACTORS LIMITING THE USE OF MEDIATION.....	62
I.	MEDIATION PROCESS.....	66
J.	SUMMARY OF CHAPTER.....	70
IV.	MEDIATION ASSESSMENT.....	73
A.	INTRODUCTION.....	73
B.	ASSESSMENT OF THE EMPIRICAL DATA.....	73
C.	ASSESSMENT OF QUESTIONNAIRE RESPONSES.....	77
D.	SUMMARY OF CHAPTER.....	87
V.	SUMMARY, RECOMMENDATIONS AND CONCLUSIONS.....	89
A.	SUMMARY.....	89
B.	CONCLUSIONS ON RESEARCH QUESTIONS.....	90
1.	Primary Research Question.....	90
2.	Subsidiary Research Questions.....	92
C.	RECOMMENDATIONS.....	98
D.	RECOMMENDATIONS FOR FURTHER RESEARCH.....	100
E.	CONCLUSION.....	101

LIST OF REFERENCES.....	103
-------------------------	-----

INITIAL DISTRIBUTION LIST .....	111
---------------------------------	-----

## I. INTRODUCTION

### A. BACKGROUND

In 1990, the United States Congress enacted the Administrative Dispute Resolution Act (ADR Act) to promote the use of alternative dispute resolution (ADR) in Government agencies. This action was in response to the consensus opinion that traditional litigation was an inefficient way to resolve disputes and in recognition "that the Government lagged well behind the private sector" in using ADR.[Ref. 61]

During the years following the law's passage, the Government learned firsthand what private corporations had realized and benefited from for years: that such alternatives to litigation have wide ranging applications and can lead to more creative, efficient and sensible outcomes. This positive experience with the wide range of dispute resolution procedures led to the permanent reauthorization of the ADR Act of 1996.[Ref. 72]

Today, the United States Navy and other Federal agencies are authorized by the ADR Act of 1996 to "not only receive the benefit of techniques that were developed in the

private sector, but may also take the lead in further development and refinement" of such ADR techniques.[Ref. 72]

Among the promising techniques, mediation has been shown to be a highly effective means of resolving disputes and some predict it will be the preferred means of resolving contract disputes.[Ref. 31] If the Navy is to maximize the benefits from its use, the mediation "best practices" as proven in the commercial world need to be identified and implemented wherever possible. This thesis explores the potential mediation has in resolving contract disputes based on the experiences in both the commercial and Navy contracting communities.

## **B. OBJECTIVES**

This thesis has the following objectives:

1. To provide information on mediation, detailing advantages, disadvantages and characteristics for case suitability.

2. To provide a cursory background on ADR and an historical synopsis of the legislation, regulations and Federal agency actions leading up to and authorizing its use.

3. To assess current published reports, research, and opinions as to the effectiveness of mediation as a means to resolve contract disputes.

## **C. RESEARCH QUESTIONS**

### **1. Primary Research Question**

What are the principal differences and similarities between how commercial organizations and the Navy use mediation to resolve contract disputes and how might an analysis of these differences and similarities be effectively used to improve the Navy's use of mediation as a form of ADR?

### **2. Subsidiary Research Questions**

a. What is mediation and how is it used as a form of ADR?

b. How do commercial organizations use mediation to resolve contract disputes?

c. How does the Navy currently use mediation to resolve contract disputes?

d. What are the principal differences between how commercial organizations and the Navy use mediation?

e. What are the principal similarities between how commercial organizations and the Navy use mediation?

f. How might the Navy improve or enhance its use of mediation through an analysis of the commercial application of mediation?

#### **D. SCOPE**

The scope of this thesis is to provide information and analysis for individuals involved in the United States Navy Acquisition community that will help assess the viability and practicality of using mediation as an efficient and effective means of settling Federal Government contract disputes. It is not the intent of the researcher to generate new empirical data or to develop a specific model to test the data. The researcher will assimilate and correlate the multitude of articles and data available and highlight the important factors found.

#### **E. LIMITATIONS**

This study is limited by the main factor that the confidential nature of mediation prevented the researcher from directly observing the mediation process employed by either the U.S. Navy or private companies. Therefore, the recommendations and conclusions drawn from this thesis are based on experiences, perceptions and opinions of those questioned on the mediation process and the literature on the subject.



## **F. ASSUMPTIONS**

This thesis was written with the assumption that:

1. The reader has a need for information on mediation and how it is used to resolve contract disputes, its advantages, disadvantages and characteristics for case suitability.

2. That the reader is in a position to use mediation as a settlement means.

3. That the reader possesses a working knowledge of ADR.

4. That the reader has further legal assistance available.

## **G. METHODOLOGY**

The methodology for this thesis entailed a comprehensive literature review, a questionnaire mailed to and answered by individuals that employ mediation to resolve contract disputes including mediators, lawyers, corporate in-house and outside counsel and academics knowledgeable of mediation practice, and phone interviews.

A comprehensive literature search and review was conducted in which over 100 articles, books, reports, theses

and hearings were reviewed by the researcher. The literature was gathered from journals and periodicals including legal, business, conflict resolution, policy manuals and web pages. Although the search was not exhaustive of the articles that have been published on mediation, the data reviewed provided an adequate sampling and cross section of what was available.

Responses to questionnaires were received from and interviews were conducted with 30 personnel from various organizations, private and public. Personnel from the Federal Government were selected from a listing of Dispute Resolution Specialists provided by the Center for Public Resources (CPR). Other personnel were selected from a listing of Corporate and Law Firm Dispute Resolution Specialists also provided by CPR, selected from the literature reviewed, recommended by others, or selected based on their credentials listed by West's Legal Directory.

All personnel who responded to the questionnaire or were interviewed were very helpful and were a rich source of information. The following is a listing of some of the

organizations to which the respondents or interviewees belonged:

1. General Accounting Office
2. Goodyear Tire and Rubber Company
3. U.S. Army Corps of Engineers, Litigation Division
4. U.S. Navy, Litigation Division
5. U.S. Air Force, Litigation Division
6. Harris Corporation
7. Office of the Deputy Assistant Secretary of the Navy
8. Piper and Marbury, L.L.P.
9. Strauss Institute for Dispute Resolution
10. Hughes Aircraft Company
11. Toro Company
12. U.S. Naval Facilities Engineering Command
13. Waste Management Inc.
14. The Mediation Consortium
15. American Arbitration Association
16. Boeing Company
17. Litton Information Systems Group
18. Department of Justice
19. Military Sealift Command

20. Teleglobe International Corporation
21. Office of General Counsel of the National  
Aeronautical and Space Administration
22. American Arbitration Association

#### **H. ORGANIZATION OF THESIS**

This thesis is organized around five chapters. Chapter I provided a brief introduction and outlined the objectives and research questions of this thesis. It established the framework and ground rules for the thesis in the scope, limitations, assumptions and methodology.

Chapter II introduces the reader to the concept of alternative dispute resolution (ADR), provides a definition of ADR, reasons for its increased use, an examination of contract dispute legislation, the advantages and disadvantages associated with ADR use and guidelines for the proper and improper employment of ADR.

Chapter III discusses mediation in detail. The mediation definition, advantages, disadvantages, guidelines for use, factors determining mediation outcome, factors limiting mediation use and a model mediation process are discussed and analyzed in terms of the literature reviewed and questionnaire responses.

Chapter IV provides an analysis and assessment of the current empirical data available on mediation and the survey responses and interviews. In the analysis, the significant differences and similarities between how the Navy and commercial organizations use and view mediation are identified and discussed.

Chapter V is a summary of the thesis and answers the primary and subsidiary research questions that were asked in Chapter I. Specific recommendations are offered by the researcher for improvements in the Navy's use of mediation. Two areas for further research are then identified and discussed. The thesis and the chapter are wrapped up in a final conclusion.



## II. BACKGROUND ON ALTERNATIVE DISPUTE RESOLUTION

### A. INTRODUCTION

The use of alternative dispute resolution methods such as mediation and arbitration can be traced to biblical times when they were used to resolve religious and civil differences.[Ref. 51] In the public sector, these methods developed through the centuries and were introduced in America in the early eighteenth century.[Ref. 25] In 1978, dispute resolution methods were formally introduced in the Federal Government with the passage of the Contracts Dispute Act (CDA).[Ref. 21]

Today, we are experiencing an "explosion of interest in ADR." The result has been increased use in the public and private sectors, ADR marketing, and sometimes court mandated use. Overloaded court dockets, the passage of legislation and regulations, and decreasing satisfaction with litigation have been primary factors for the increased use.[Ref. 18] Examples of the current and widespread use of ADR include a recent survey of the 1000 largest companies in America reporting 88 percent have used mediation, 79 percent used arbitration, 41 percent used mediation-arbitration

(med-arb), and 23 percent have used a mini-trial within the last three years.[Ref. 45] Similarly, awareness and use of ADR by the Federal Government have "increased exponentially" since the passage of the ADR Act of 1990. Pilot programs at the Federal Deposit Insurance Corporation produced savings of 9.3 million dollars in one year.[Ref. 18] Yet, despite these recent advances within the Federal Government, it has been recognized that some agencies have not embraced ADR. Resistance to change and a lack of education appear to contribute to the Government's lagging behind the commercial sector in its use of ADR to resolve disputes.[Ref. 61]

## **B. DEFINED**

The Administrative Dispute Resolution Act of 1996 defines alternative means of dispute resolution as:

Any procedure that is used to resolve issues in controversy including but not limited to conciliation, facilitation, mediation, factfinding, mini-trial, arbitration and use of ombuds, or any combination thereof.

Other definitions include the benefits of timely resolution, cost savings, improved relations and confidentiality, all of which are attributes of the specific methods listed in the ADR Act of 1996.[Ref. 3]



### C. REASONS FOR INCREASED ADR USE

In order to understand the specific ADR methods available to resolve contract disputes, it is necessary to understand the reasons they are needed. This understanding allows a potential user to focus on those problems affecting his organization, plan for and apply the most appropriate ADR method, and to monitor its effectiveness.[Ref. 25] The following are some of the reasons for the increased use of ADR in both public and Government contracting.

1. Overloaded court dockets - In our society, we depend on courts to resolve disputes that in other societies would be handled on a more informal basis. The result is an increase in laws and regulations and a corresponding backlog of cases in the Federal courts.[Ref. 18]
2. Legislation and regulations - Federal laws and regulations such as the ADR Act of 1996 and Executive Order 12979 encourage the use of ADR and establish it as an effective means to resolve many contract disputes.[Ref. 18]
3. Increasing cost and decreasing satisfaction with litigation - Commercial companies and the Federal Government have started to realize the negative affects and increased costs associated with litigation. Losses in dollars, personnel time, opportunities, and diminished business relationships are often the result of the litigation process.[Ref. 18] If litigated, a dispute can include appeals, complaints, depositions, subpoenas, hearings and time for a

decision. This process can take up to four years. [Ref. 44]

4. Historical reasons - The growing impact of Government contracting, complexity of contracts, auditing and regulatory requirements and an "expanded notion, perhaps overexpanded, notion of necessary due process rights." [Ref. 21]
5. The ever increasing willingness to litigate - Contractors, often dependent on the Government, have a tendency to resort to litigation and at the same time, the Government contracts bar is expanding. [Ref. 21]

#### **D. CONTRACT DISPUTE LEGISLATION**

In 1949, as Defense procurement increased, the Armed Services Board of Contract Appeals (ASBCA) was created. The Board was designed to provide an "informal and relatively expeditious" way to resolve disputes, much like ADR is used today. Prior to the 1963 U. S. v. Bianchi Supreme Court case, a party unsatisfied with a Board outcome could take a case to the U.S. Court of Claims (USCC). This Supreme Court ruling made BCA decisions final regarding factual determinations, thus requiring the Boards to become more judicialized in order to guarantee due process, therefore the time and money needed to litigate cases increased. Over time, as Government agencies and the number of court cases

grew, so did the number of Boards of Contract Appeals.[Ref. 21] Today, a BCA case will take between two to four years to be decided.[Ref. 44]

The following list chronicles the legislation, regulations and Federal agency actions that have shaped the ADR landscape we see today. These initiatives have helped the Government employ alternatives to avoid the time-consuming and expensive litigation and appeals process.

#### **1. Contract Disputes Act (CDA) of 1978**

Congress enacted the CDA with the intention of providing a "fair and efficient" system which encouraged the parties to solve their disputes through negotiations prior to litigation. The procedures set out in the Act include the claims process, the contracting officer's final decision (COFD) and appeals to the BCA or USCC.[Ref. 21]

#### **2. Administrative Dispute Resolution Act (ADR Act) of 1990**

The Act called for the use of alternative means to resolve disputes when Government agencies are involved. Each Federal agency was required to designate a specialist who is tasked with developing procedures to "enhance Government operations and better serve the public." [Ref. 71]

Congress found that alternative means to resolve disputes can provide cheaper, faster and more agreeable decisions leading to more favorable outcomes. It charged the Administrative Conference, which no longer exists, to give assistance to Federal agencies in establishing ADR programs. Further, the Act increased the authority of the Federal Mediation and Conciliation Service to allow it to aid Federal agencies in resolving problems within any Federal program.[Ref. 71] The key provisions to this Act included the authorization for agencies to employ mutually agreed upon neutrals, the establishment of rules to protect the confidentiality of ADR proceedings to a limited extent, approval of the use of arbitration with the award rendered becoming final thirty days after it is decided and an amendment to the CDA of 1978, giving authority and encouragement to Government parties to employ ADR.[Ref. 74]

### **3. Federal Agency Pledge**

On May 24, 1994, as a result of the National Performance Review, twenty-four Federal agency officials, including officials from the Armed Forces, pledged to implement ADR in current disputes, reduce ADR barriers, team

and cooperate within the Federal Government and to consider expanding partnering procedures. Although no measurable effects on the use of ADR can be linked directly to this pledge, it was a sign of higher level approval and support within each of the agencies.[Ref. 27]

#### **4. Federal Acquisition Streamlining Act of 1994**

This Act places added emphasis on Federal Government ADR use by requiring Contracting Officers and contractors doing business with the Federal Government to provide in writing, the reasons why ADR was rejected as a form of dispute resolution. Further, it added four years to the sunset provision in the ADRA of 1990, allowing agencies to use ADR until 1999.[Ref. 73]

#### **5. Executive Order 12979**

Among the directions given in this action, the President emphasized that agencies should use their best efforts to resolve bid protests through Contracting Officers and that ADR should be used when appropriate.

The affects of this order have not yet been officially documented. An evaluation report from the Administrator of the Office of Federal Procurement Policy(OFPP) is due late

in 1997.[Ref. 28] However, initial responses appear significant. The General Accounting Office (GAO) and the General Services Board of Contract Appeals (GSBCA) started separate initiatives in 1996 that would make their respective lawyers and judges available to serve as neutrals for the resolution of bid protests.[Ref. 35]

#### **6. Executive Order 12988**

Among the directions given in this action by the President, anyone involved in civil litigation with the Government is encouraged to make reasonable attempts to use the particular ADR method that best fits the given dispute. Additionally, the Order calls for the training of Government's litigation counsel in ADR methods.[Ref. 29]

#### **7. Administrative Dispute Resolution Act of 1996**

Dr. Steven Kelman, the Administrator of OFPP, as well as other Federal and civilian agency heads who shared overwhelming enthusiasm for the passage of this Act, testified before the Senate Committee on Governmental Affairs that the passage of this Act would continue the momentum agencies had gained in expanding ADR use. Further, the Act strengthened confidentiality measures which was an



especially important addition for the use of mediation.[Ref. 61]

The Act became law and now permanently establishes ADR as a means by which DoD agencies can continue to save money and time, improve contracting relationships and build upon their impressive, though not successfully statistically proven, ADR resumes that were included as testimony before the Senate. The statute further improved upon the 1990 Act by eliminating the need for claim certification for claims below \$100,000 and the Government's ability to ignore arbitration decisions.[Ref. 34]

## **8. Agency Responses**

The impact of the legislation and executive orders has been significant. DoD agencies have established ADR policies and programs to foster the use of ADR whenever possible. As a leader in the field, the Navy has directed its activities to consider all disputes a potential candidate for ADR. The Boards of Contract Appeals have agreed to make their services available to act as neutrals in the resolution of bid protests and disputes. So much activity is taking place that retired ASBCA Judge Robert

Gomez considers it a "revolution" and believes that the Government has now widely recognized that ADR works best in the great majority of cases.[Ref. 34]

The following evidence shows ADR's increasing impact. In a recent survey conducted by Administrative Judge Martin J. Harty of the ASBCA, some encouraging statistics on the increasing use of ADR at the BCA level have been documented. From 1994 through 1996 the number of cases recommended for resolution using ADR have more than doubled from 19 to 42, while all other BCAs combined have reported an increase in ADR use from twelve cases in 1994 to 116 in 1996. The success rate has remained constant over the three years at ninety percent.[Ref. 49] Further encouraging evidence has been reported by the GAO. Since 1994, the number of formal protests has decreased at a rate of 12 percent per year.[Ref. 32]

#### **E. ADVANTAGES**

When compared to the traditional litigation method of resolving disputes, ADR offers the following advantages.

1. Speed - While typical court proceedings take years to settle disputes due to backlogs and the use of strict procedures which include appeals, complaints discovery, subpoenas, hearings, and time to render



decisions, ADR can be used to solve disputes within months, weeks or even days.[Ref. 21]

2. Cost - By settling disputes in less time, legal fees are minimized and production delay is avoided.[Ref.74]
3. Flexibility - The ADR process can be formulated to fit the needs of the parties involved. The length, location, time and format can be decided and agreed upon by the parties in the dispute.[Ref. 74]
4. Control - The parties determine the process, amount of legal influence, issues in dispute and most importantly, the parties retain the control to make the final decisions regarding payment, rather than the dispute being decided by a third party.[Ref. 44]
5. Cooperation - Parties remove themselves from the adversarial-based legal system, which then allows for "win-win" outcomes which are more likely to produce relationships allowing for further business relations.[Ref. 74]
6. Confidentiality - Some protections from the Freedom of Information Act give the parties the opportunity to resolve disputes without the proceedings and agreements being subject to disclosure to other parties.[Ref. 44]

#### **F. PROPER USE**

As mentioned in the introduction, a large number of disputes may be properly resolved using ADR. In order to gain the potential advantages previously listed, the

following criteria should be used to evaluate potential cases.[Ref. 74]

1. Solutions, other than those most likely to be determined in a Court or a Board, are desired by the participants.
2. The parties do not wish to set a precedent.
3. All interested parties can participate.
4. Parties wish to keep proceedings confidential.
5. It is believed that all parties will agree to the use of ADR.
6. ADR will save time and/or money, when compared to the projected litigation.
7. Parties predict or have experienced difficulties communicating or agreeing upon technical aspects of the dispute.

#### **G. DISADVANTAGES**

The use of ADR does not guarantee that the parties involved will reap the potential benefits previously listed. The following is a list of potential outcomes that are not desired by participants.[Ref. 44]

1. The time and cost involved in the settlement of an ADR case may increase the litigation expenses because of the potential that non-binding methods do not ensure agreement on a settlement.
2. Involving a neutral may increase the cost and time involved to reach settlement, and/or take control away from the ADR participants.

3. A precedent is not set when one is needed.
4. Due to the wide range of ADR options available, not all participants will be familiar or comfortable with its use, in lieu of litigation. This appears to be a significant factor within the DoD contracting community.
5. The lack of rules associated with ADR when compared to the legal process, may lead lawyers to not recommend its use.
6. Proposing or agreeing to ADR use may signal a party's belief in a weakness in their case.

#### **H. IMPROPER USE**

The ADRA of 1996 provides the following guidance to Federal agencies on when not to use ADR. The situations below are guidelines and do not prohibit an agency from employing ADR. [Ref. 5]

1. A definitive and authoritative decision is needed as a precedent.
2. The matter involves significant issues of Government policy and ADR will not assist policy development.
3. Maintaining established policy and avoiding variations are of special importance.
4. The matter significantly affects nonparties.
5. A public record of the proceeding or resolution is important.

## I. SUMMARY OF CHAPTER

This chapter explained the theory of ADR and identified the reasons it has become an increasingly popular alternative to litigation in the public and private sectors. The advantages and disadvantages of using ADR were identified along with the situations in which it can be properly or improperly employed. The chapter ended with a chronological synopsis of the legislation and regulations which have advanced ADR use by Government agencies.

As recent as two years ago it could be said that "In light of the tremendous success of ADR progresses, the efforts of the Federal Government thus far in attempting to implement ADR have been meager at best." [Ref. 44] But apparently, with the evidence used by the Federal agencies to help pass the ADRA of 1996, Judge Harty's recent study, and GAO's reported use, ADR implementation has gained significant momentum in the Federal Government in the last two years. This recent increase in use, coupled with its matching success, signals the need for greater understanding of ADR methods available to Federal agencies involved in contracting in order to "maximize the value in the business

relationship and give the taxpayer more value out of  
Government contracting." [Ref. 61]



### III. MEDIATION

#### A. INTRODUCTION

Now that the researcher has defined alternative dispute resolution, explained why its use has increased, described the advantages and disadvantages to using it and given a brief history of the contracts disputes legislation, it is time to define and discuss mediation. Mediation is considered to be one of the major ADR methods available to resolve contract disputes. It appears to be the ADR of choice "because of its power to be flexible and its efficacy towards resolution." [Ref. 34] By analyzing the mediation literature and mediation questionnaire responses, a comprehensive view of the mediation process, its uses, advantages, disadvantages, and factors determining its successful outcome will be attained.

The current mediation literature reviewed included books on mediation use and establishing ADR programs, law review articles which provided perspectives on a wide range of ADR aspects, other theses on ADR and mediation and Government reports and hearings on ADR use and implementation. These sources provided an adequate sample

of the vast number of literature resources available on this topic.

A questionnaire, also described in Chapter IV, was designed to identify differences and similarities between how commercial organizations and the Navy view and use mediation as an ADR method to resolve contract disputes. Questions were crafted by the researcher based on findings in the literature that suggested areas where possible differences might exist.

## **B. BACKGROUND**

The use of mediation dates back to biblical times when it was used extensively by clergymen to resolve family, criminal and diplomatic disputes. Mediation use within many societies continued to expand through the following centuries. The emergence of secular societies helped mediation grow at an even faster rate. During this period it was used to settle disputes in business guilds and disputes between cities. The growth of mediation became exponential at the start of the twentieth century with the biggest increase in use coming in the last twenty five years. During this period, mediation has been used to



resolve domestic, organizational, commercial, family, labor, contractual, environmental and public policy disputes.[Ref. 69] This increased usage has been attributed to the growing "acknowledgment of individual human rights and the belief that an individual has a right to participate in and take control of decisions affecting his or her life." [Ref. 51]

Today, the public sector uses mediation more than any other form of ADR to settle disputes.[Ref.38] Within the construction industry, mediation has become the primary means for settling disputes. It stands out as being particularly advantageous when compared to litigation and other ADR methods because of its unique characteristics. These key characteristics include its "flexibility, informality and voluntary and non-binding nature." [Ref. 31]

Among Federal agencies, the Department of Labor, Farm Home Administration, Federal Deposit Insurance Corporation and the Environmental Protection Agency have used mediation to resolve a wide range of disputes, with each having reported money savings.[Ref.74] This is by no means an exhaustive list of success stories. An increasing number of Federal agencies, many of which testified in the Senate

hearings on the ADR Act of 1996, are reporting increased use.

Use in the Department of Defense (DoD) is also on the rise with the Air Force using mediation extensively to resolve labor and equal opportunity cases, reaching settlement in nearly four out of five cases.[Ref. 68] Although historically the Federal Government and DoD have not used mediation to resolve contract disputes, recent case studies describing the successful use of mediation to resolve Air Force construction disputes have been published.[Ref. 68] The Army Corps of Engineers, a well-known leader in ADR advancement, has also reported considerable cost and time savings resulting from the use of mediation. Mediation use within the Navy has been considerably less than that in the other Services. The Navy has favored other ADR methods to resolve contract disputes. The reason for this limited use is the lack of familiarity with mediation and the Navy's satisfaction with their level of success using other ADR methods.

## **C. DEFINED**

### **1. Literature Review**

The review of the mediation literature produced many different definitions. The following definition embodies the salient characteristics appearing in most definitions.

Mediation is a dispute resolution process in which a neutral and impartial third party assists the people in conflict to negotiate an acceptable settlement of contested issues. Mediation is frequently used to avoid or overcome an impasse, when parties have been unable to negotiate an agreement on their own. [Ref. 69]

Other definitions address the mediator's lack of authority to determine the final outcome while conversely stressing that the parties in the dispute have control over the outcome. [Ref. 31]

### **2. Questionnaire Responses**

The questionnaire responses indicated that attorneys and mediators generally agreed with the mediation definition found in the literature. However, the definitions provided by the respondents did include differences of opinion among respondents with regard to the type of assistance the mediator is expected to give during the course of a mediated dispute. The responses received did not show a specific tendency of favoring one form of assistance over the other

within the groups of Government attorneys, outside or in-house industry counsel, mediators or academics.

The majority of respondents indicated that the mediator should be limited to assistance in the form of facilitation, that is helping the parties resolve their dispute by aiding negotiations without rendering an opinion on the position of the party or the merits of the dispute itself. Members of this group indicated that if an evaluation was desired by either of the parties, then another form of ADR should be employed to resolve the dispute.

A significant minority of respondents indicated that if both parties wanted evaluative input from the mediator then it was acceptable and often helpful for the mediator to provide an evaluation. This group indicated that facilitation was also necessary. Those individuals favoring evaluative mediation often remarked that it was most helpful if evaluations were given only after facilitation failed to move the parties beyond an impasse. The type of evaluations most often mentioned were the mediator's professional opinion on the merits of either side's position as well as his opinion of how a court would rule on the dispute.

Several respondents indicated that this type of mediation is what most organizations desire when they solicit mediators. Respondents in both the private and public sectors indicated that if an evaluation was not part of the mediation process then they would not enter into an agreement to use mediation. The minority group clearly indicated that an evaluation by mediator was an expected benefit of mediation and a part of the mediation process.

A smaller group of respondents did not indicate the nature of assistance that the mediator should provide.

### **3. Analysis**

The researcher observes that there is both a strong consensus in the literature and survey responses regarding most of the characteristics contained in the mediation definition provided. There are also tremendous differences of opinion on the type of assistance a mediator is expected to render during a mediation. All respondents agreed in some form that mediation was an assisted negotiation where the mediator was impartial and neutral and that mediation was useful in helping to overcome an impasse in negotiations. Agreement was also observed in regards to the

non-binding nature of mediations where the final outcome was solely that of the parties and not that of the mediator. This shows that a clear understanding appears to exist of what mediation is, and when mediation can be used.

The critical difference in opinions on the role of the mediator shows how mediation use can be limited based on the perceptions of those making the decision to use it as an ADR method. It also shows a potential difficulty in selecting mediation as an ADR method, as one side might employ mediation solely to facilitate negotiations while the other might want the mediator to provide an evaluation. In this example, the differing views on mediation could end in the parties not selecting mediation as a form of ADR. Finally, these findings show that the parties in a dispute must understand the other's perception of mediation in order to agree upon its use.

#### **D. ADVANTAGES**

By examining the mediation literature and questionnaire responses, a solid base of information regarding the advantages provided by mediation is identified, discussed and analyzed.



## 1. Improved Relations

### a. *Literature Review*

The use of litigation to resolve disputes suggests an adversarial process that limits the meetings between participants to a few "often emotionally charged" encounters.[Ref. 31] Conversely, mediation calls for the consideration of the relationship between the two parties to help examine the real problems at hand. Unlike litigation and other ADR methods, cooperation is encouraged as a way to save the business relationship for future dealings. Many "win-win" alternatives are often presented. This leads to both parties agreeing and supporting the final settlement.[Ref. 31]

In a 1991 American Bar Association (ABA) survey of its members practicing in the construction industry, the question of when to use mediation received the strongest response in favor of its use when the parties were concerned with their continuing business relationship. The importance of this factor was highlighted when the respondents placed improving relations ahead of time and money considerations.[Ref. 64]



### ***b. Questionnaire Responses***

The improved relations between disputants was rarely listed as a measure of mediation success or identified as a characteristic of contract disputes for which mediation is successful at addressing. However, the extent to which relationships of the parties involved in a dispute affected decisions to use or recommend mediation was great. Among the choices of dollar value in controversy, nature of the dispute and the relationship of the parties, the latter received the majority of responses listing it as the most important factor. The responses were evenly distributed across the groups surveyed, with no significant differences in views between private or Government counsel respondents. Mediators and academics questioned also recognized the relationship of the parties as a significant factor in their recommending mediation as a form of ADR.

### ***c. Analysis***

The questionnaire responses give strong support to the 1991 American Bar Association (ABA) survey findings as well as the rest of the literature findings in that the future relationship of the parties appears to be an

important factor in the decision to use or recommend mediation. The relatively equal number of responses among those from both the private and public sectors recognizing that mediation helps to foster long term relationships shows how both sides understand that the most value in a relationship is gained from working together rather than treating the other side as an adversary as is the case in litigation. This type of thinking bodes well for the increased use of mediation in resolving contract disputes and the declining tendency to use litigation which increases the number of adversarial contract relationships between the Government and its contractors.

## **2. Time Savings**

### ***a. Literature Review***

The time that it takes to resolve disputes is often dependent on the desires of the parties to settle issues and their willingness to reach an acceptable solution.[Ref. 69] By proceeding with litigation, parties show little of either desire or willingness to settle their dispute and the result is a process that can take years to produce a resolution.

The 1991 ABA survey reporting on close to 500 mediation experiences, showed that mediation resulted in settlement in two days or less in over fifty percent of the cases. Nine out of ten cases were resolved in six days or less.[Ref. 69] In regards to recommending mediation to a client, if time was a concern, mediation was strongly recommended. In a 1994 ABA survey which included lawyers, contractors and design professionals involved with the construction industry, mediation was viewed as the best ADR method available to reduce dispute resolution time.[Ref. 69]

***b. Questionnaire Responses***

Time savings was listed as a measure of mediation success considerably more often by private counsel than Government counsel. Private attorneys recognized the relationship between time and cost savings and indicated that if a timely resolution can be gained through mediation, the project will not be adversely affected and the contractor is unlikely to be "unduly financially strapped."

The issue of time savings was also listed as a reason for selecting mediators with experience in the technical or legal area in dispute. Private counsel

respondents cited the experience of the mediator as a way to save time during mediation. Their rationale was that if the mediator is already experienced with the issue being disputed, they did not have to "waste" time educating the mediator.

### *c. Analysis*

The researcher observes that a clear distinction exists between the importance placed on time savings by private counsel compared to the importance placed on time savings by Government counsel. The private sector indication that time savings is a significant measure of mediation success appears to show that contractors may be more aware of the resulting cost savings that can be attained by spending fewer hours resolving a dispute. The cost savings comes in two forms. The first is in the form of decreased fees paid to in-house or outside counsel. The second is in the form of savings resulting from the decreased fees paid to the neutral for hours or days of work performed.

Conversely, the lack of Government responses indicating the importance of time savings appears to show a

lack of acknowledgment of the resulting cost savings that will occur when less time is spent resolving a dispute. Given these responses, it appears that the Government attorneys may be less likely to use mediation because the significant time savings advantage gained by using mediation is not given the same consideration as is given by the private sector attorneys. Additionally, this may indicate that Government attorneys are not as "in touch" with the business or "bottom line" aspect of Government contracting as they should be. This becomes an important issue because the Contracting Officer is required to seek guidance from the legal staff when considering ADR.

### **3. Cost Savings**

#### ***a. Literature Review***

Mediation provides cost savings beyond those caused by a shortened dispute resolution process. Because mediation focuses on negotiations between decision makers on each side of the dispute rather than on extensive legal representation, legal fees are kept to a minimum.[Ref. 69] Other indirect costs savings which can be easily overlooked are those associated with lost business opportunities

associated with diversion of staff and attention from ongoing business activities. Although DoD contracting is not a commercial business per say, saving taxpayer dollars is always important, especially today when Defense procurement budgets are decreasing. Additionally, the advantage of cost savings can be used to convince another party to use mediation to reduce their costs.[Ref. 34]

Attorneys in the 1994 survey ranked mediation as the best ADR method available for reducing costs. The design professionals and contractors also gave mediation high marks for cost savings.[Ref. 64]

#### ***b. Questionnaire Responses***

Like time savings, cost savings was listed as a measure of mediation success more often by private sector counsel, mediators and academics than Government counsel. Cost savings was also identified as a unique incentive for using mediation in the dispute resolution process. Mediators acknowledged that mediations do not require counsel and that even if counsel is present during the mediation session, the costs are still decreased.



Respondents indicated that the use of mediation reduces paperwork, discovery and other costly aspects of litigation.

### ***c. Analysis***

The questionnaire responses from the private attorneys indicate that their clients are interested in using mediation to reduce legal expenditures. As with time savings, the lack of influence cost appears to have on the Government's decision to use mediation might explain why they are less likely to employ mediation. Additionally, the differences in opinion of the significance of the "bottom line" appear to be present between private and Government counsel.

## **4. Flexibility and Adaptability**

### ***a. Literature Review***

The strict constraints placed on potential settlements by the legal system and "outcomes that are limited by previous court decisions," limit issues that can be addressed by parties involved in a legal dispute.[Ref. 69] Mediation allows parties to deviate from pre-existing legal theories or remedies and parties can agree upon the dispute proceedings, mediator and issues to be



addressed.[Ref. 31] The "solution crafted through mediation is designed specifically and will apply to the dispute at hand." Mediation differs from other forms of ADR by allowing the mediator to communicate as needed and he can gather important information any way he chooses.[Ref. 31]

The mediation procedure can have a simple structure that is capable of solving a wide range of disputes. The 1991 construction lawyer survey found that disputes involving defective work, project delays, payment problems, contract changes and property damage were all resolved using mediation.[Ref 37]

Finally, mediation can be useful when it is introduced early on in the dispute or after litigation has started and the format can be changed at any time.[Ref. 31]

#### ***b. Questionnaire Responses***

The questionnaire responses were similar to the reported literature findings. There were no distinctions between groups of respondents. Respondents indicated that almost any type of contract dispute can be resolved using mediation. Respondents cited one of the keys to achieving the flexibility advantage that mediation provides is the

ability of the parties, with the help of the selected mediator, to tailor the proceedings so that the interests of the parties can be addressed and satisfied. Respondents made it clear that issues and interests in a dispute are often different and that each had to be addressed. Creativity in the proceedings and outcomes were often listed as a reason to enter into mediation.

Respondents also agreed that mediation can begin at any time during a dispute. The majority of respondents indicated that mediation works best when introduced early on in the resolution process.

### ***c. Analysis***

The researcher observes that the wide ranging effectiveness mediation has been reported to have in the literature appears to be accurate considering the questionnaire responses. Both Government and industry lawyers as well as the practicing mediators have cited many types of contract disputes that can and should be resolved with mediation. This strong endorsement of the flexibility and adaptability of mediation gives credence to the predictions that mediation will become the ADR of choice for

resolving contract disputes. However, these findings raise the question of why mediation has had such limited use in resolving Navy contract disputes. The issue now appears to be how can the Navy successfully use mediation more often rather than whether it can be effective in the type of contract disputes they encounter. This issue and recommendations on how the Navy can successfully use mediation will be discussed later in this thesis.

## **5. Control**

### ***a. Literature Review***

Litigation and some forms of ADR leave the settlement decision up to a third party.[Ref. 69] These methods often rely on lawyers and are carried out in a complex, legal language.[Ref. 31] By allowing the negotiation representatives to select the mediator and formulate and agree upon a settlement, mediation provides the parties with a feeling that they, the most informed individuals, contributed to the process and made the final settlement decision.[Ref. 31]

In the 1994 survey, mediation received the best marks for any ADR method from lawyers and overall high marks

in all of the fields surveyed for providing the best understanding of the case to the individuals involved in resolving the dispute. [Ref. 64]

Finally, an important aspect of mediation is the participants' ability to stop the mediation if they believe an agreement cannot be reached or when they believe continuing the mediation will not prove beneficial. Mediation gives parties an option that has very little risk involved. If mediation is not successful, very little is lost by either party. [Ref. 31]

#### ***b. Questionnaire Responses***

As identified in the literature, control was deemed by respondents to be a significant advantage gained by using mediation. In an equally positive manner, private sector and Government attorneys and dispute resolution specialists as well as mediators, listed party control over the mediation process and mediator selected as a means for the disputants to reach settlements that were impossible for litigation to provide. The reason for ranking mediation first among ADR alternatives was the resulting "win-win"

outcomes often reached with mediation. One respondent best expressed this feeling when he stated:

All settlements are 'win-win' because parties have the ultimate control over the outcome. If they don't think they won, that is, reaching the best settlement possible given the circumstances, then they would not agree to the settlement.

Respondents also listed process control as a major factor that made mediation the least intimidating ADR method available.

Differences of opinion did exist between private sector attorneys and mediators and Government attorneys with regards to whom within the organization "controls" the decision to enter into mediation and who is authorized to settle a dispute. The private sector responses indicated a tendency to rely more heavily on the legal departments to make the decision to use mediation and ADR in general. The Government attorneys and mediators familiar with Government disputes, indicated that the decision to enter into mediation prior to litigation rested with the Contracting Officer. They sighted the Federal Acquisition Regulation (FAR) as the reason for this practice. They also recognized that the Contracting Officer's decision should not be made

until legal advice was sought. Both sides agreed that consideration of views from outside parties such as General Managers in the private sector and Program Managers for the Government were important and were always taken into consideration.

Both sides also agreed that a lawyer often presents the case or leads the organization during a mediation. However, both sides indicated that the use of a team during mediations was most useful. Respondents stated that a typical team would consist of lawyers, contracting personnel and often technical representatives. The final difference was that the private sector indicated more often that the decision authority to settle often resided with their lawyers. The Government respondents indicated that the decision to settle belonged to the Contracting Officer unless the case was already in the Federal Claims Court litigation process and the case was turned over to a Justice Department attorney. At this time, the attorney had the authority to settle the case, but in reality he still sought input from the Contracting Officer before making his decision.



### **c. Analysis**

The literature reviewed and questionnaire responses indicate that party control is a significant advantage that mediation provides when compared to litigation and other forms of ADR. Control, along with improving relations, is an area that almost all respondents list as a reason to choose mediation to resolve contract disputes. By recognizing this as an advantage, potential users on both sides of a dispute are more likely to select or agree to mediation as a means to resolve disputes. Once again, these findings give credence to the prediction of the future increase in the use of mediation.

### **E. DISADVANTAGES**

Mediation like all forms of ADR has circumstances in which its use may not be advisable. By examining the literature and questionnaire responses, a solid base of information regarding the circumstances in which mediation use could hinder the dispute resolution process is identified, discussed and analyzed.



## **1. Literature Review**

The mediation disadvantages most often identified and discussed in the literature are also disadvantages to ADR use in general. These disadvantages include the use in circumstances when an opponent is believed to be acting in "bad faith", when there is a possibility that mediation will only lengthen the litigation process and when either party desires that a precedent be established.[Ref. 22]

## **2. Questionnaire Responses**

The majority of respondents agreed with the literature in that there were circumstances that made it preferable not to employ mediation. There were no distinctions in responses between the group of private and public sector attorneys. The respondents in this group added a considerable number of disadvantageous situations to the three most often listed in the literature. However, a significant minority disagreed with this group and the most common response of all collected was that there were no situations or circumstances that exist that would make them not recommend mediation to resolve a contract dispute. This

group often stated that any ADR method was better than litigation.

While the majority of respondents did list situations that made mediation inappropriate for, or a less desired means of, resolution, there was little concentration among the answers. Besides the most common answer, that mediation was appropriate for all disputes, respondents most often cited "bad faith" participation and the need to set a precedent as reasons not to use mediation. Other responses mentioned less often included disputes based solely on legal issues, disputes with a belligerent opponent, disputes requiring injunctive relief and cases having a clear winner. A final Government unique situation was mentioned by industry attorneys as being a situation where given the timing of the resolution and budgeting difficulties, the Government would not be able to fund a settlement. Respondents cited this situation as one that exists and that when it occurs it undermines the Government's credibility and limits the likelihood that contractors will consider ADR in the future to resolve their disputes with the offending Government agency.

### 3. Analysis

The researcher observes that based on the mediation literature and questionnaire responses, using mediation can be disadvantageous in several situations or circumstances. Those responses in favor of using mediation under any circumstances or describing mediation as having no disadvantages appear to be overly optimistic. They also indicate the need for the education of the workforce regarding when ADR and specifically mediation, should be used. The relative frequency of this answer among the responses may also indicate that a tendency to "over promote" mediation might exist. These individuals from both sectors appear to give too much significance to the parties' ability to withdraw from the mediation at any time. The literature and several respondents listed "bad faith" participation as a potential disadvantage resulting in one side entering a mediation in good faith and then revealing to the "bad faith" opponent information that can be used against them later in litigation. It could be too late to withdraw before this occurs, therefore it would be wise to evaluate the opponent's behavior and motives for mediating

rather than entering into a mediation agreement, as those favoring mediation under any circumstances would recommend.

Finally, the researcher observes that the disadvantages discussed in the literature and surveys are not unique to mediation and are almost always the same as those that would be considered disadvantages for all ADR methods.

#### **F. MEDIATION GUIDELINES**

No matter how successful mediation may appear to be, there are times when it should not be used. The below list was compiled from the literature reviewed and is meant to be a general guideline on when mediation may or may not be appropriate or useful.

##### **1. Mediation is most likely appropriate when:**

- a. Both parties agree to mediation.[Ref. 69]
- b. Parties desire a future business relationship.  
[Ref. 37]
- c. Time is an important factor.[Ref. 37]
- d. Cost is an important factor.[Ref. 37]
- e. Discussions have broken down between the two parties.[Ref. 69]
- f. Parties wish to avoid setting a precedent.[Ref. 69]
- g. Confidentiality is important[Ref. 74]

h. Failure to settle does not give one party an advantage over the other.[Ref. 74]

**2. Mediation is not likely to be appropriate when:**

a. The matter in dispute involves legal precedent.  
[Ref. 37]

b. Credibility of a witness is in question.[Ref. 37]

c. A party is believed to be acting in "bad faith."  
[Ref. 69]

d. A party is believed to be withholding relevant information.[Ref. 69]

**G. FACTORS DETERMINING MEDIATION OUTCOME**

While the definition of a successful mediation often differs depending on the participant's goals and expectations, the factors determining the mediation outcome achieved are the same. The two variables or factors that affect mediation outcomes the greatest are the mediator selected and the mediation procedures employed. When considering mediation as an ADR method, both of these factors should be examined before an agreement to use mediation has been reached.[Ref. 38]

**1. Procedure**

**a. Literature Review**

A report on the construction contracting surveys conducted among ABA attorneys indicated that in mediations

where the rules were developed by the participants, rather than participants using predetermined or commonly recommended rules, they were five times more likely to settle. Lawyers surveyed in this study suggested that the length of mediation, discovery limitations, mediator's role and interests and expectations of the parties should be considered when determining the mediation procedure used.

#### ***b. Questionnaire Responses***

The respondents in all groups often indicated a preference for tailoring established, outside agency procedures to fit their immediate mediation needs. Numerous outside agencies or mediation providers such as the American Arbitration Association, the Center for Public Resources, and JAMS-ENDISPUTE, were listed as groups that had sound, well-proven procedures. Reasons for recommending the tailored use of the established procedures of outside agencies were the advantages of experience and expertise, completeness of procedures and the resulting ease of acceptance by both parties. The ability to tailor the guidelines was almost always cited as a means to get the desired flexibility mediation provides.



A small number of respondents in both the public and private sectors recommended that an organization's procedural guidelines be formulated in-house. Those familiar with Government contracting cited the uniqueness of each organization and their contract types as a reason to use in-house expertise as the sole basis for establishing mediation procedures.

Regardless of the origin of the procedures, most respondents agreed that it was always appropriate to discuss them with the mediator and opposing party before an agreement to use mediation is reached.

### ***c. Analysis***

The researcher observes that the practice of mediation participants developing procedural guidelines as reported in the literature was often the method used by the survey respondents. While many respondents cited the usefulness of pre-existing or established guidelines, they all agreed that by tailoring these guidelines, the best results could be achieved. It appears that similarities exist in how both the Government and private sector attorneys develop mediation procedures. The most prevalent



process includes parties having the flexibility to tailor existing guidelines based on the dispute while considering input from the mediator and the opposing party, as well as considering their own goals and expectations.

## **2. Mediator**

### **a. Literature Review**

Literature sources indicate that the mediator's skills and the process he will use have great influence on the outcome of a dispute resolution.[Ref. 15] The parties need to decide what role the mediator should take in helping them reach an agreement and this role should be clearly communicated to the mediator. There are a wide range of techniques a mediator can use to assist the parties.[Ref. 69]

In general, at one end of the spectrum, a mediator can act in an "evaluative" manner, directing parties in their negotiations, determining agendas and offering opinions on the issues. These opinions can focus on the strength or weakness of a case, legal position or validity or ways to settle the dispute.[Ref. 58] The approach at the other end of the spectrum is having a mediator acting as a

facilitator. In this role, the mediator proposes questions and helps with information exchange in an attempt to have the parties evaluate their own positions and develop settlement options.[Ref. 58] A significant finding was that over three out of four survey respondents recommended that "the mediator should be allowed to offer opinions regarding issues in dispute." [Ref. 64]

Depending on the type of dispute and the parties' expectations, a mediator should be selected according to the likelihood that the mediation approach will remove the barriers that are keeping the parties from reaching settlement.[Ref. 58] However, it should be noted that many times it is not until after the mediation begins that the parties will truly understand what they want or need in the mediation.[Ref. 64]

In the 1991 ABA survey, the mediator attributes ranked in order of importance were impartiality, listening skills, trust worthiness, and their ability to understand complex issues.[Ref. 64]

### *b. Questionnaire Responses*

The responses across all groups showed that the selection of the mediator greatly influenced the outcome of mediation. While there was no single answer provided on how to properly select mediators, several recurring answers did stand out. The parties review of the mediator and his background was often listed as a necessity in mediator selection. Criteria often used by members of the public and private sectors included the mediator's process and substantive expertise, impartiality and neutrality. Of course, respondents recommended that agreement on the mediator selected was a necessity.

The majority of respondents also uniformly agreed that the type of dispute greatly affected their mediator selection process. Respondents often noted that mediator experience in the area of the dispute was critical and that this was especially true for Government contract disputes.

There was a less than overwhelming agreement in favor of recommending the use of outside agencies to propose mediator candidates. The majority of private attorneys and mediators recommended this practice. They cited the

usefulness of such agencies in providing evaluations, training and backgrounds on mediators. The Government lawyers did not often indicate the use of outside agencies but indicated that they might consider it and that it "sounded like a good idea." About half of the Government lawyers indicated that an ad hoc or word-of-mouth process was best for selecting mediators and that the private sector mediation providers often lacked the expertise needed in Government contract disputes. A small minority of private sector attorneys said they only use outside agencies when initial attempts at unassisted mediator selection fails.

Finally, there was agreement between the groups on which type of skills were most important for the mediator to possess. The majority of respondents indicated that facilitative skills were more important than the mediator's technical knowledge in the area being disputed. A significant number in both groups indicated that it was best if the mediator possessed both skills. One respondent indicated that both skills were necessary because the parties often do not know what skills are going to be

required or are most helpful prior to the start of the mediation process.

*c. Analysis*

The literature reviewed and questionnaire responses suggest that mediator selection is critical to successfully resolving contract disputes. The mediator's background and experience, the type of dispute and the expectations of the parties are all factors that need to be considered in the selection process.

The differences of opinion regarding the use of outside agencies to propose candidates suggests that there is no single method that presents itself as the best way to select a mediator. However, the responses also indicate that private sector attorneys are more aware of the benefits of such outside agency assistance and that the use of an outside agency was a possibility not often considered by Government attorneys. These factors indicate that the potential of using these agencies to gain the advantages discussed previously has yet to be fully explored by the Government attorneys. Considering the funding needed to maintain a list of qualified neutrals and staff offices to

provide services which can be provided by the public sector, it appears that this practice of using outside agencies could be beneficial to the Government as it has been for commercial organizations.

#### **H. FACTORS LIMITING THE USE OF MEDIATION**

Despite the fact that studies on ADR have consistently found that mediation produces high levels of user satisfaction and settlement compliance[Ref. 12] and mediation features often make it preferable to other forms of ADR[Ref. 31] several factors appear to limit the use of mediation to resolve Government contract disputes. By examining the literature and questionnaire responses, an understanding of these limiting factors and potential solutions to them is discussed and analyzed.

##### **1. Literature Review**

The mediation literature suggests three factors appear to limit the growth and widespread use of mediation. The first obstacle is the reluctance of potential users to stray from the security of traditional litigation.[Ref. 44] One reason contributing to their dependence on the litigation process or other forms of ADR is that both sides are



reluctant to try a dispute resolution method in which they are unfamiliar. Reluctance also comes from the apparent erosion of the Contracting Officer's authority which inhibits his willingness to negotiate a compromise.[Ref. 21]

On the contractor's side, the same detractors are also apparent. If a participant in a contract claim is a middle manager, their options appear limited to the unlikely chance of negotiating an extraordinary deal, letting someone else take responsibility for a less than favorable settlement, e.g. a lawyer, or letting a judge decide. Additionally, a middle manager, like a Contracting Officer, may face questions, criticisms and sometimes reprimand. With the options and realities facing participants, litigation often looks favorable.[Ref. 36]

A second obstacle is that lawyers from both the public and private sectors may not be familiar or comfortable with ADR in general and therefore do not advise the parties to use mediation and other forms of ADR.[Ref. 21]

The final obstacle is more directly related to mediation. Mediation "suffers from ambiguity." Because mediation can be used in such a wide range of disputes,



people examining it for potential use and trying to evaluate its effectiveness in a given case, have difficulty understanding the process. Mediators use a wide range of strategies, tactics and techniques when facilitating negotiations to reach a favorable settlement.[Ref. 58]

The literature suggests that the way to overcome these factors limiting the use of ADR and specifically mediation is by educating the potential users in both the private and public sectors on how ADR can be used to resolve contract disputes.[Ref. 21]

## **2. Questionnaire Responses**

Respondents from all groups indicated that there were a significant number of barriers that affect the use of mediation in resolving Government contract disputes. Respondents agreed that the ambiguity of mediation was a problem. One Government attorney remarked that he often finds when parties in the Government contracts arena discuss using mediation, they are often unaware of what mediation is and are often discussing and using methods other than mediation and they do not even realize it.

Respondents in all groups seemed to disagree with the literature finding that the lack of familiarity resulted in a reluctance to try mediation. They indicate that the wide ranging and successful use of mediation in the public sector provides enough proof to potential users that mediation can be used to resolve contract disputes.

Respondents in all groups also indicated the importance of top level management support and several Government attorneys indicated that this support was lacking. The evidence given in support of this view was the lack of funding given for agency ADR efforts. They felt this greatly affected their ability to train and educate potential users on the various ADR methods available to resolve contract disputes.

Finally, the most commonly suggested way to remove the barriers and increase the use of mediation was to "try it more often." Respondents felt increased use would help parties to better understand the process while gaining a better appreciation for the advantages it provides. The overwhelming response by private attorneys, mediators and academics was to increase use by including a clause in the

contract calling for its use. Government attorneys recommended this option less often.

### **3. Analysis**

The researcher observes that several factors limit the growth and widespread use of mediation to resolve contract disputes. The relative lack of first hand experience using mediation combined with the security provided by the use of familiar dispute resolution processes appears to be a significant factor, especially in the Navy. It is evident from the literature and questionnaire responses that the increased use of mediation will only occur if active steps are taken by members of the contracting community. Absent funding to train and educate the workforce or the mandatory use of a clause calling for the consideration of mediation, as is commonly used in commercial contracting, this situation appears unlikely to change.

#### **I. MEDIATION PROCESS**

The stages of the mediation process as recommended by the Center for Public Resources[Ref. 19] will be used as a model to familiarize the reader with the general mediation process. This model incorporates most of the activities

seen in other models suggested in current mediation research for business disputes. The research questionnaire respondents were not asked to recommend or discuss specific processes and an analysis of the process will not be conducted. The large number of possible process alternatives and the need to develop a unique process for individual disputes based on several factors made any analysis or recommendation of mediation procedures beyond the scope of this thesis.

### **1. Propose Mediation**

As discussed earlier, mediation should only be used when both sides agree that it is the proper alternative. This first step typically occurs when negotiations of some sort have not produced the desired results and one party realizes mediation is likely to produce a better resolution. A clause can also be part of the contract to guarantee the use or the consideration of mediation.

### **2. Select a Mediator**

The selection of a mediator is the single most important factor in determining user satisfaction. Parties

should be aware of the wide range of strategies, techniques and approaches a mediator can and will employ.

### **3. Establish Ground Rules**

At this point, the parties will meet jointly with the mediator to agree upon the process to be used. In order to prepare effectively, the means of presenting information to the mediator and the other party should be clearly established. CPR provides a list of clauses that can be included in an agreement. Other than these rules, two important points should be agreed upon. The first is that each side should have an official present during negotiations with the authority to agree to a settlement. This assures both sides that once an agreement is reached, it is not subject to review and possible rejection by the other side. The second is that each party will negotiate in good faith. Neither side wants the other to use this process as a means to gather information to be used against them during litigation.

### **4. Presentation**

Typically, each party will submit a summary and present their views on the dispute. The mediator may request

additional information from either side. If he believes there are legal issues in dispute, he may ask both sides to prepare a legal brief. This information is given to the mediator in strict confidence and should not be made known to the other party unless an alternative agreement is reached. Oral presentations can also be requested by the mediator.

In complicated cases, these presentations may occur well ahead of the scheduled mediation so the mediator has time to understand the case and prepare a strategy.

#### **5. Exchange of Information**

Information can be exchanged directly between the parties or through the mediator. This will depend on the process employed by the mediator.

#### **6. Negotiation of Terms**

Settlement proposals can be offered by the parties or initiated by the mediator. This is usually determined when the ground rules are established. Efforts to reach a settlement will continue until the mediator concludes mediation will not produce a settlement agreement, a party withdraws or a written settlement is reached.



## **7. Settlement**

Again, as established in the ground rules, either the mediator or one of the parties will draft the agreement. The draft will be reviewed and amended and then formally executed.

## **J. SUMMARY OF CHAPTER**

This chapter has introduced, discussed and provided analysis on the literature reviewed and the questionnaire responses collected for this research effort. Points of agreement and disagreement on the mediation definition, advantages, disadvantages, factors determining mediation outcome and factors limiting mediation use were identified, discussed and analyzed. Additionally, guidelines for use and a model mediation process were presented.

The advantages to using mediation include improving business relations, time and cost savings, flexibility and adaptability and party control. Disadvantages, although not unique to mediation, include "bad faith" participation, a prolonged litigation process and the inability to establish a precedent. Critical factors determining outcome were the mediation procedure used and the mediator selected.



Finally, the factors limiting mediation use to resolve contract disputes were identified as being the reluctance to stray from litigation and more familiar ADR methods, the unwillingness of lawyers to recommend mediation and a general lack of understanding of the mediation process.



#### **IV. MEDIATION ASSESSMENT**

##### **A. INTRODUCTION**

Mediation has been suggested as being a preferred ADR method for resolving contract disputes by ADR proponents in the private sector. This preference indicates that mediation is worthy of consideration as a "best practice" available to anyone engaged in a contract dispute. Empirical evidence shows that mediation can be used effectively to resolve contract disputes involving defective work, project delays, payment problems, contract changes and property damage.[Ref. 37] This evidence established from private sector experiences is critical for Navy contracting personnel considering that these types of disputes are the same as those encountered in Navy procurement.

The following sections provide an assessment of the empirical data that are currently available and an assessment of the questionnaire responses attained in this research.

##### **B. ASSESSMENT OF THE EMPIRICAL DATA**

Among the literature reviewed for this research effort, four significant evaluations on ADR use in the private

sector indicate that mediation is the most frequently used form of ADR in resolving contract disputes and is the clear favorite among ADR methods available to help parties achieve their goals when resolving contract disputes. These studies are significant to this research effort because they fulfill the need for information of potential ADR users in both the private and public sectors as they move beyond the long espoused "random hearsay" or proposed theory into an environment of factual information.[Ref. 64]

The first of these comprehensive studies is the 1991 ABA Forum on the Construction Industry Survey, reported on by Henderson, which was "intended to provide detailed information regarding the respondents' perceptions of and experiences with various dispute resolution processes as a guidepost for future planning." [Ref. 64] This survey included only attorneys.

The second comprehensive study was the 1994 ABA Multidisciplinary Survey on Dispute Avoidance and Resolution in the Construction Industry, reported on by Stipanowich, which had the goal of "informing and educating those engaged in the public and private contracting on issues regarding

the relative costs and benefits of various alternatives to adjudication." [Ref. 64] This survey included attorneys, contractors and design professionals.

The third study was the 1994 CPR Institute for Dispute Resolution ADR Cost Savings and Benefit Study which showed just how significant the monetary savings for private sector users of mediation was, when compared to other ADR methods.

Finally, the fourth study was the 1997 Cornell University and Price Waterhouse L.L.P. Study of the Use of ADR in U.S. Corporations which was a comprehensive effort to examine how the 1000 largest U.S. corporations employ ADR.

As a whole, these four studies present clear and convincing evidence of the benefits mediation provides when compared to litigation and the other forms of ADR. Mediation was proven to provide disputants with the greatest time and cost savings, high degrees of process and outcome satisfaction, a realistic understanding of the dispute, while minimizing future disputes and enhancing future working relationships. Additionally, mediation use was predicted to increase in the future and appears to be the focus of industry ADR training efforts. In the Cornell

Study, among the 1000 largest U.S. corporations surveyed, mediation was used to resolve most disputes in almost all of the industries represented. Finally, no drawbacks unique to mediation were found in the studies assessed.

In the absence of any similar comprehensive ADR studies focused on Navy or DoD ADR use, this empirical evidence should serve as an acceptable substitute in signaling that mediation is worthy of increased consideration for resolving Navy contract disputes. Although studies on DoD ADR use could go a long way in convincing potential users within the DoD and the Navy of mediation effectiveness, neither the Navy nor its sister Services should wait until such a study is conducted before they recognize the benefits mediation provides and use it to gain the rewards proven in private sector studies. It is the researcher's belief that such a study would be costly, time consuming, and would likely produce similar findings to those in the private sector, which are based on superior surveys that capture a far greater number of ADR experiences.

## C. ASSESSMENT OF SURVEY RESPONSES AND INTERVIEWS

Thirty personnel from various private sector and Government organizations responded to a survey questionnaire or were interviewed during this research effort. While the majority of the literature focused on the successful private sector application of mediation, the survey and interviews provided insight as to the significant differences and similarities between how commercial organizations and the Navy view and use mediation. A thorough analysis of these differences and similarities will provide answers to how the Navy can improve or enhance its use of mediation. With this goal and based on the information provided from the respondents, the following is an assessment of these differences and similarities.

### 1. Differences

The number of differences between how commercial organizations and the Navy use mediation were few but appear to contribute greatly to the way mediation was employed by commercial organizations and the Navy. Four significant differences are discussed below.



*a. Commercial Organizations Versus Navy Organizations*

Commercial Organizations use mediation considerably more often than Navy organizations. This difference is significant because those organizations who use mediation are most often satisfied with the process and outcome and have a better understanding of mediation and a greater awareness of its benefits. Mediation use in the private sector takes the form of a self-fulfilling prophecy. As people use and become familiar with the process, they reach higher levels of satisfaction and they become more likely to use mediation to resolve future disputes. The researcher believes the same outcome could be achieved in the Navy once personnel started using mediation instead of only using the ADR methods in which they are currently more familiar.

While significant empirical evidence and survey responses suggest that mediation has emerged as a preferred ADR method for resolving contract disputes in the commercial sector and its use is likely to increase in the future, mediation use for resolving Navy contract disputes has been

rare. The Navy has a tradition of using neutral evaluations and mini-trials and these ADR methods have become more familiar to contract personnel. Individuals in the Navy indicate that it is difficult "to get people to try something different."

The inference to be drawn from this difference is not that the Navy should abandon its consideration of the ADR methods it is currently using. However, if the Navy workforce were to fully consider all of the ADR alternatives available, the researcher believes that the Navy would have a similar experience as that of the commercial organizations. That experience has been that when all ADR alternatives are considered, mediation is often selected as the method of ADR that best satisfies the needs and desires of its users. Mediation provides benefits to its users that make it a preferred ADR method for resolving contract disputes, so it is used often and eventually becomes familiar to those responsible for resolving contract disputes.

### *b. Awareness of Time and Cost Savings*

Commercial organizations appear to be more aware of the time and cost savings provided by mediation. This difference is significant because the entire ADR effort in both the private sector and the Navy is focused on finding the most efficient alternatives to litigation. While other forms of ADR provide users with certain efficiencies, survey respondents collectively responsible for resolving a large number of contract disputes similar to those in which the Navy is involved, clearly stated their preference for using mediation when time or cost savings was a consideration. As is often the case for disputes involving the Navy, these two factors are nearly always a consideration. By not appreciating these benefits, Navy personnel are less likely than their private sector counterparts to employ mediation, hence, losing out on the valuable benefits provided by this ADR method. In a time of decreasing or stagnant defense budgets, the Navy can ill afford to ignore the cost saving benefits mediation has been empirically proven to provide for private sector organizations.

### *c. Top Level Support*

Commercial organizations have more top level support in the form of adequate funding to educate and train individuals in ADR methods. This is a significant difference because with the lack of funds to properly train and educate those individuals responsible for resolving disputes in the most efficient manner, the Navy is likely to depend on those ADR methods with which they are already familiar or litigation and are unlikely to employ more efficient methods such as mediation, when appropriate.

The legal departments of the commercial organizations surveyed consistently remarked how adequate staff training allowed individual attorneys to consider the full range of ADR alternatives and select the method best suited for the dispute. The best method often ended up being mediation.

Navy and other Government personnel surveyed often remarked that a lack of funding resulted in inadequate workforce education and training and a decreased capability to conduct adequate third party neutral evaluations. Respondents indicated that ADR responsibilities were

"additional duties" and that those offices responsible for overseeing and administering ADR programs were understaffed due to inadequate funding.

Increased funding to improve the level of workforce education and training and establish proper ADR office manning levels would provide needed emphasis to the current statutes and regulations that already exist, calling for the increased use of ADR. The researcher believes that if properly trained, Navy personnel responsible for overseeing and resolving contract disputes would have the same experience as their private sector counterparts. By having the confidence and ability to consider the full range of ADR alternatives, Navy personnel would often find that mediation is the best ADR method available to resolve contract disputes, and would therefore employ it more often.

***d. Contract Clause Requiring the Use of Mediation***

Commercial organizations were significantly more likely to include a clause in the contract requiring the use of mediation if a dispute arises. Because commercial organizations have successfully used mediation to resolve contract disputes, many include clauses in their contracts

requiring that mediation be used as a first step in resolving any disputes that may arise. Including this clause is significant because it forces potential ADR users to train for and educate themselves in proper mediation use. Further, including this clause in the contract signals to opposing parties that the consideration of the parties' future business relationship is important. Finally, the clause also signals the awareness of mediation effectiveness on behalf of Navy contracting professionals that is demonstrated in the following assessment of the similarities between how the Navy and private sector personnel view mediation.

Commercial organizations believe that it is best to reach agreement on the ADR method to be used before a dispute arises so that one less step towards resolution is already taken care of, leading to a faster resolution. Some private sector respondents indicated a preference to use the clause requiring mediation because they found its use to be effective even in cases where they were initially skeptical in their beliefs that mediation would be successful. Additionally, these respondents indicated that little was



lost by trying mediation, often mentioning the ease of withdrawing from mediation and moving on to other forms of ADR or continuing on with litigation.

Navy and other Government personnel favored either not using a clause or using a clause simply stating that ADR would be considered before the parties would proceed with litigation.

## **2. Similarities**

The number of similarities between how Navy and private sector personnel view mediation and its applicability to resolving contract disputes was greater than the number of differences in how it was actually used in practice. The significance of these similarities is that the Navy contracting workforce appears to be poised for mediation implementation through education and training and possibly the mandatory use or consideration of mediation with the use of a contract clause calling for its use when a dispute arises. It should not be difficult to convince potential users of mediation's effectiveness considering their existing knowledge and the evidence available from the private sector experience. However, while there appears to



be considerable agreement on what mediation is and how it can be used, these similarities are not currently significant enough to make mediation a preferred ADR method within the Navy. The significant similarities are discussed below.

***a. Mediation Definition***

All survey respondents agreed that mediation in its most basic form was an assisted negotiation in which the impartial and neutral mediator helped the parties to overcome an impasse. Additionally, respondents agreed that mediation was non-binding and the final outcome was reached by agreement between the disputants.

***b. Benefits Provided by Mediation***

Survey respondents and interviewees indicated that mediation was a flexible ADR method giving a high degree of control to its participants while providing the best opportunity for maintaining or improving future relations between the disputants.

***c. Importance of the Mediator***

Respondents and interviewees acknowledged that the single greatest factor in determining a mediation outcome and their satisfaction with the process was the mediator and

the process he used to help the parties overcome their impasse. Because of the important role of the mediator, many respondents indicated the need for a thorough interview and evaluation process for selecting a mediator.

***d. When Mediation is Inappropriate***

While relatively few in number and none specifically limited to mediation, respondents and interviewees often acknowledged that there were times when mediation should not be used in lieu of litigation.

***e. Mediation is a Successful ADR Method for Resolving Contract Disputes***

Members of the private and public sectors indicated that pilot programs are not necessary before mediation is given greater consideration for use by the Navy to resolve contract disputes. An overwhelming number of survey respondents acknowledged the successful use of mediation in resolving the same or similar types of disputes in the commercial world as those that exist in Navy contracting, and feel that no further study of its effectiveness should be required before it is used to resolve Navy contract disputes.

#### D. SUMMARY OF CHAPTER

This chapter focused on the researcher's assessment of recently compiled empirical data and the survey and interviews conducted for this research effort. The importance of this chapter to this thesis is that what has been professed in theory appears to be true. Mediation is a form of ADR that is often successfully employed by private sector organizations to resolve contract disputes. The disputes are often the same or similar to those in which the Navy is often involved. By not using mediation in the wide ranging types of disputes which it is often successful, the Navy is not receiving the benefits from ADR techniques developed by the private sector and are certainly not taking the lead in the further development and refinement of mediation as they are authorized to do by the ADR Act of 1996.

The comprehensive ADR studies suggest that mediation is a preferred ADR method used for resolving contract disputes in the commercial sector. The survey responses and interviews highlight the significant differences and

similarities that exist in the use and views of mediation by commercial organizations and the U.S. Navy.

This assessment shows that through significant use, commercial organizations have benefited greatly from mediation use in disputes that are similar to those encountered by Navy contracting personnel. This use within commercial organizations has been fostered by top level management support in the form of adequate funding for workforce education and training and the required usage of mediation to resolve contract disputes. By taking similar actions, the Navy is capable of enjoying the same benefits empirically proven to exist within commercial organizations who employ mediation as a means to resolve contract disputes.

## V. SUMMARY, RECOMMENDATIONS AND CONCLUSIONS

### A. SUMMARY

The fact that significant empirical evidence exists showing that commercial organizations successfully use mediation as a preferred means of resolving contract disputes suggests that the Navy would benefit if greater consideration were given to using mediation to resolve disputes that are similar in nature to those encountered by commercial organizations. By identifying and analyzing the similarities and differences between how commercial organizations and the Navy use mediation, successful "best practices" can be identified for potential use by the Navy contracting workforce.

The Navy's increased use of mediation to resolve contract disputes would provide the Navy with a highly flexible and adaptable ADR method capable of saving time and money while improving business relationships. All of the advantages gained through mediation use are those that the recent contract dispute legislation, executive orders and DoD regulations were intended to foster.

Although it is not reasonable to abandon consideration of other ADR methods or to recommend the use of mediation in every contract dispute, the theoretical and empirical evidence now available can ensure the Navy official properly choosing mediation to resolve a dispute, that the chances for success and satisfaction are high.

## **B. CONCLUSIONS ON RESEARCH QUESTIONS**

### **1. Primary Research Question**

What are the principal differences and similarities between how commercial organizations and the Navy use mediation to resolve contract disputes and how might an analysis of these differences and similarities be effectively used to improve the Navy's use of mediation as a form of ADR?

The primary difference in mediation use is the fact that commercial organizations are much more likely to use mediation as a means to resolve contract disputes. The apparent reason for this difference is that commercial organizations have a greater appreciation for and understanding of the time and cost savings mediation provides, a superior level of training and education among their employees responsible for resolving disputes and a willingness to use a clause in a contract requiring the use

of mediation because of their confidence in mediation as a means to resolve a wide range of contract disputes.

No similarities exist in how mediation is used, but similarities do exist in the way mediation is perceived by both sides. Survey respondents from the Navy and commercial organizations appeared to agree on the mediation definition and the potential benefits mediation is capable of providing disputants. Both sides also agree on the importance of the mediator and the process he employs to help reach a settlement. Finally, both the Navy and commercial organizations agree that mediation has been proven as a successful ADR method for resolving contract disputes.

By analyzing these differences and similarities, it should be evident to the Navy that they need to focus its efforts on implementation. Considering the theoretical and empirical evidence provided in this thesis, the Navy should adopt the commercial practice of using mediation to resolve a greater number of contract disputes. Steps toward implementation include, giving proper consideration of mediation as an option for resolving disputes, requiring a clause in a contract requiring mediation use when



appropriate and simply using it more often. An analysis of the mediation use by commercial organizations would show the Navy how this final step would make the Navy contracting workforce as familiar and comfortable with mediation use as their commercial counterparts.

## **2. Subsidiary Research Questions**

**a. What is mediation and how is it used as a form of ADR?**

Mediation is defined as:

A dispute resolution process in which a neutral and impartial third party assists the people in conflict to negotiate an acceptable settlement of contested issues. Mediation is frequently used to avoid or overcome an impasse, when parties have been unable to negotiate an agreement on their own.[Ref. 52]

Mediation is non-binding and can be used by parties in a wide range of contract disputes to include disputes involving defective work, project delays, payment problems, contract changes and property damage. Parties have successfully used mediation in situations calling for facilitative or evaluative assistance depending on their perceived needs and desired outcomes.

**b. How do commercial organizations use mediation to resolve contract disputes?**

Mediation has emerged as a preferred ADR method for resolving contract disputes among commercial organizations. Because commercial organizations use mediation, they are aware of the benefits it provides.

Because commercial organizations recognize that mediation is often the best ADR method available for improving business relationships and providing time and cost savings, flexibility and adaptability and control over the outcome, commercial organizations focus their ADR training efforts on mediation. This training is often provided by outside agencies. Additionally, commercial organizations often use a contract clause which calls for the required employment of mediation when a dispute arises.

Once mediation use is agreed upon, commercial organizations often tailor existing process guidelines to fit their specific needs for the given dispute. They also select a mediator with an adequate technical background in the area of the dispute and the ability to provide both

evaluative and facilitative assistance necessary to bring the parties to a settlement.

**c. How does the Navy currently use mediation to resolve contract disputes?**

The Navy's use of mediation to resolve contract disputes has been rare. The Navy has depended on other forms of ADR such as early neutral evaluation and the mini-trial. Presently, the contracting workforce appears hesitant to try another form of ADR and does not possess an understanding of or an appreciation for the benefits mediation has been proven to provide commercial organizations.

**d. What are the principal differences between how commercial organizations and the Navy use and view mediation?**

The number of differences between how commercial organizations use and view mediation were few, but appear to contribute greatly to why the Navy has favored other forms of ADR over mediation. The following principal differences exist.

1. Commercial organizations simply use mediation considerably more often and have become familiar and comfortable with its use more so than the Navy. As

commercial organizations increase their use of mediation to resolve contract disputes, they become more familiar with the process and gain higher degrees of satisfaction with the mediation process and the resulting outcomes. This success encourages commercial organizations to find an increasing number of ways in which it can be employed.

Because the Navy contracting workforce has little or no experience in the actual practice of mediation, a similar movement toward increased use is not apparent. Absent a movement to introduce greater mediation use within the Navy, dependency on other forms of ADR will continue.

2. Commercial organizations appear to be more aware of the time and cost savings provided by mediation. Survey respondents from commercial organizations consistently listed these benefits as reasons for employing mediation to resolve contract disputes. These savings resulted from a shortened dispute resolution process which requires less in legal expenditures and creates fewer lost business opportunities and fewer distractions from ongoing business activities. By not recognizing such benefits, Navy personnel are less likely to consider mediation compared to

their commercial counterparts when deciding on the best method to use to resolve contract disputes.

3. Commercial organizations have more top level support in the form of adequate funding to educate and train individuals in all ADR methods. By providing adequate funds to properly train employees for resolving contract disputes, commercial organizations can better consider the full range of ADR alternatives and select the method best suited for a particular dispute. This best method is often mediation.

While the Navy has significant legislative and regulation support calling for the use of ADR, they like the other Services, have inadequate levels of funding available to provide adequate education and training to their individuals responsible for resolving contract disputes. Once again, this leads Navy personnel to depend on other ADR methods with which they are already familiar, therefore, they are unlikely to employ mediation when appropriate.

4. Commercial organizations are significantly more likely to include a clause in the contract requiring the use of mediation if a dispute arises. This is a common practice among commercial organizations who recognize the

benefits mediation is likely to provide. Commercial organizations believe that the inclusion of this clause in a contract signals to the other side that their future business relationship is important and they feel this is a way to limit the steps in the dispute resolution process.

If the Navy were to take similar action and require a similar clause in their contracts, it would signal their recognition of mediation effectiveness and potential benefits it provides while encouraging its workforce to focus training and education efforts on the use of mediation in resolving contract disputes.

**e. What are the principal similarities between how commercial organizations and the Navy use mediation?**

There are no actual similarities between how the Navy and commercial organizations use mediation to resolve contract disputes because the Navy rarely uses mediation. However, several similarities exist with regards to how the two perceive the role that mediation plays in resolving disputes. Both the Navy and commercial organizations agree in most part on the definition of mediation, the potential benefits it provides, the importance of the mediator and the process he employs and the factors that exist that make



mediation and other forms of ADR not favorable. The two sides also agree that sufficient empirical evidence exists to indicate that mediation is a successful ADR method for resolving contract disputes.

f. How might the Navy improve or enhance its use of mediation through an analysis of the commercial application of mediation?

Based on the fact that commercial organizations have used mediation to successfully resolve a large number of contract disputes that are the same or similar to those experienced by the Navy, the Navy could improve its use of mediation by adopting the commercial practices. This entails recognizing the differences between how the two sides use mediation that have been defined and discussed in this thesis and finding ways to resolve those differences.

### C. RECOMMENDATIONS

The following recommendations are offered by the researcher and are based on the researcher's assessment of the literature, surveys and interviews conducted.

Recommendation #1: In order to gain a broader perspective of what ADR is and all of the options available to potential users, the Navy should include the use of



outside agencies to provide training to its workforce. There are a considerable number of outside agencies capable of providing Navy personnel with a balanced viewpoint on a wide range of ADR alternatives, one of which is mediation. These organizations are also considered to be a credible source of information by commercial organizations, thereby giving employees confidence to help move the Navy beyond its current consideration of a limited number of ADR methods.

Recommendation #2: The Navy should provide higher levels of funding and assign more personnel to the Navy's ADR office. These added resources can be used to conduct and publish case studies, produce newsletters and conduct other activities such as coordinating ongoing in-house training and establishing and maintaining a database of neutrals. All of these activities would help spread information and give assistance to those trying to improve the way they employ ADR. The researcher believes that in doing this, the chances for improving the way we use mediation will be enhanced.

Recommendation #3: The Navy should mandate the consideration of mediation to resolve contract disputes.

Policy or regulation calling for the use of a contract clause that requires mediation to be used when a dispute arises, given appropriate circumstances, could accomplish this objective. This recommendation is based on the success of commercial organizations using this practice and the fact that there is little to lose by simply entering into mediation. Additionally, the best way to learn how to use a specific method of ADR, is by using it.

**Recommendation #4:** For anyone using mediation to resolve a contract dispute, they should select a mediator with adequate technical or legal experience in the area being disputed. This practice has been shown to save time and money and allows parties to focus their efforts on resolving the dispute rather than educating the mediator. This can be accomplished by conducting a thorough screening of potential third party neutrals.

#### **D. RECOMMENDATIONS FOR FURTHER RESEARCH**

The following are two recommendations for further research on mediation.

1. It is recommended that a case study be conducted on a mediated dispute, where estimated savings of both time and

money are determined. This would require advance notice from a Navy contracting command as well as information on historical dispute resolution costs. This research would provide actual evidence of the actual time and cost savings mediation is capable of providing the Navy contracting community.

2. A case study should be conducted on a mediated dispute where both the commercial organization and the Navy's process for selecting and conducting a mediation are analyzed. This research could provide evidence highlighting reasons for existing differences and similarities between how commercial organizations employ mediation.

#### **E. CONCLUSION**

Commercial organizations have benefited significantly by using mediation to resolve contract disputes. The commercial use and the resulting benefits mediation provides have helped make mediation a preferred means of resolving contract disputes, making it worthy of Navy efforts to increase its use. If the Navy implements the commercial mediation practices detailed in this thesis, they will improve their chances for avoiding litigation while creating

new and improved ways to gain sensible and efficient outcomes to their contract disputes.

## LIST OF REFERENCES

1. "A Beginner's Guide to ADR," [@http://www.adr.org](http://www.adr.org), November 26, 1996.
2. "A Guide to Mediation and Arbitration for Business People," [@http://www.adr.org](http://www.adr.org), April 20, 1997.
3. "ABC's of ADR: A Dispute Resolution Glossary," Alternatives, pp.113-118, Vol. 10, August 1992.
4. Accetta, Robert T., "Mediators as Problem Solvers," The Colorado Lawyer, pp.561-564, Vol. 23, 1994.
5. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, ACUS, Washington D.C., February 1992.
6. Administrative Conference of the United States, Office of the Chairman, Mediation: A Primer for Federal Agencies, ACUS, Washington D.C..
7. Administrative Conference of the United States, Office of the Chairman, Toward Improved Agency Dispute Resolution: Implementing the ADR Act, ACUS, Washington D.C., February 1995.
8. Amadei, R.N. and Lehrburger, L.S., "The World of Mediation: A Spectrum of Styles," [@http://www.adr.org](http://www.adr.org), February 2, 1997.
9. Anderson, M.L., "Intellectual Property Mediations: Special Techniques for a Special Field," Texas Intellectual Law Journal, pp.23-32, Vol. 3, 1994.
10. Arrow, K. et al., Barriers to Conflict Resolution, New York, W.W. Norton Company, 1995.

11. "Briefs: Pecos Dam Mediation," Alternatives, pp.13-15, Vol. 9, March, 1991.
12. Bush, R.A., "What Do We Need a Mediator For? Mediators 'Value Added' For Negotiators," Ohio State Journal on Dispute Resolution, pp.1-36, Vol. 12, 1996.
13. Carr, F., "How to Design a Dispute Resolution Program," Alternatives, pp.36-43, Vol. 12, March 1994.
14. Carr, F., DeLanoy, J.T., and McDade, J.M., "Alternative Dispute Resolution: A Streamlined Approach to Resolving Differences," Topical Issues in Procurement Series, pp.1-14, Vol. 6, 1995.
15. Chaykin, A.A., "Selecting the Right Mediator," Dispute Resolution Journal, pp.58-65, Vol. 49, 1994.
16. Costantino, Cathy A., "Can Private Parties 'Get to the Government?' Advice for Using ADR with Federal Agencies," Alternatives, pp.33-37, Vol. 11, October 1993.
17. Costantino, Cathy A., "How to Set Up an ADR Program," Government Executive, pp. 44-49, Vol. 26, 1994.
18. Costantino, Cathy A. and Sickels-Merchant, Christina, Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations, Jossey Bass Inc., San Francisco, California, 1996.
19. "CPR Model ADR Procedures: Mediation of Business Disputes," Alternatives, pp.129-140, Vol. 9, 1996.
20. Cronin-Harris, Catherine, "Mainstreaming: Systematizing Corporate Use of ADR," Albany Law Review, pp.847-878, Vol. 59, 1996.
21. Crowell, E.H. and Pou, C. Jr., "Appealing Government Contract Decisions: Reducing the Costs and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques," Maryland Law Review, pp.183-254, Vol. 49, 1990.



22. Day, Karen K., "An Implementation Guide for Settling Contract Disputes Within DOD Using Alternative Dispute Resolution Methods," Master's Thesis, Naval Postgraduate School, California, December 1989.
23. Department of Defense, 5000 Series, 1996.
24. Domber, Jeffrey, "ADR: Underway at GSA," Contract Management, pp.54-58, November 1996.
25. Eaton, David S., "Alternative Dispute Resolution: A Viable Method for Settling Government Contract Disputes," Master's Thesis, Naval Postgraduate School, California, June 1993.
26. Edwards, C., Office of the General Counsel, Department of the Air Force, Phone Interview, November 7, 1996.
27. Executive Office of the President, Office of Management and Budget, Administration Pledges to Expand Use of Alternative Techniques to Resolve Contract Disputes, May 16, 1994.
28. Executive Order 12979, Agency Procurement Protests, CFR 1995 Compilation, pp.417-418, October 25, 1995.
29. Executive Order 12988, Civil Justice Reform, CFR 1996 Compilation, pp.157-163, February 5, 1996.
30. Feinberg, Kenneth R., "A Procedure for the Voluntary Mediation of Disputes," Practising Law Institute Corporate Law and Practice Course Handbook Series, pp. 285-307, March 28, 1990.
31. Feinberg, Kenneth R., "Mediation - A Preferred Method of Dispute Resolution," Pepperdine Law Review, pp.15-42, Vol. 16, 1990.
32. "GAO Tries Its Hand at ADR for Bid Protests," The Government Contractor, pp.5-6, Vol. 39, October 9, 1996.



33. Ghais, Suzzane, " The Measure of A Mediator, " [@http://www.bbb.org](http://www.bbb.org), April 23, 1997.
34. Gomez, R.J., "ADR In Government Contracting: Trend or Revolution," The Government Contractor, pp.3-8, Vol. 39, April 30, 1997.
35. "GSBCA Clarifies Its New ADR Role," The Government Contractor, pp.5-6, Vol. 38, October 16, 1996.
36. Guittard, C., "Preparing for Mediation and Negotiation (Part 1)," Practical Lawyer, pp.77-83, Vol. 37, 1991.
37. Hargez, Bobby M., "The ABC's of Effective ADR," Louisiana Bar Journal, pp.142-146, Vol. 43, August 1995.
38. Henderson, D.A., "Mediation Success: An Empirical Analysis," Ohio State Journal on Dispute Resolution, pp.105-147, Vol. 11, 1996.
39. Kakalik, J.S. et al., An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act, Rand, California, 1996.
40. Kenagy, Robert T., "ADR and Beyond: Whirlpool's Search for Efficient and Effective Dispute Resolutions," Albany Law Review, pp.895-903, Vol. 59, 1996.
41. Kolb, Deborah M., The Mediators, Massachusetts, The MIT Press, 1983.
42. Krause, J., "The Use of Alternative Dispute Resolution Techniques to Resolve Government Contract Disputes: A Case Study," Master's Thesis, Air Force Institute of Technology, Ohio, May 1991.
43. Kressel, Kenneth, Pruitt, Dean, G. and Associates, Mediation Research, Jossey-Bass Inc., California, 1989.

44. Lamari, M.R., "The Role of Alternative Dispute Resolution Techniques to Resolve Government Contract Disputes," Hofstra Law Review, pp.205-244, Vol. 23, Fall 1994.
45. Lipsky, David B. and Seeber, Ronald L., "The Use of ADR in U.S. Corporations: Executive Summary," [@http://ww2.conflictresolution.org/perc/projects](http://ww2.conflictresolution.org/perc/projects), August 13, 1997.
46. Long, Andre, "Resolving Disputes While Preserving Relationships," Master's Thesis, Georgia Institute of Technology, Georgia, May 1994.
47. Long, Andre and Wehle-Eihnhorn, Robert J., "The Mediation Alternative: Guiding the Acquisition Workforce From Theory to Practice," National Contract Management Journal, pp.1-7, Vol. 27, 1996.
48. McDade, Joseph M., "The Administrative Dispute Resolution Act of 1996: What You Need to Know to Make it Work for You," Office of the General Counsel, Department of The Air Force, Unpublished Paper, Spring 1997.
49. McDade, Joseph M., Office of the General Counsel, Department of the Air Force, Phone Interview, November 18, 1996.
50. Mix, Darrick M., "ADR in the Construction Industry: Continuing the Development of a More Efficient Dispute Resolution Mechanism," Ohio State Journal on Dispute Resolution, Vol. 12, 1997.
51. Moore, Christopher W., The Mediation Process: Practical Strategies for Resolving Conflict, Jossey-Bass Inc., California, 1996.
52. Morton, D.G., "Alternative Dispute Resolution in the Construction Process: A Course of Study for Construction Managers," Master's Thesis, Georgia Institute of Technology, Georgia, Spring 1988.

53. Newman, W.A., "Use of Non-Adjudicated Third Party Dispute Resolution Methods Within the United States Government," Ohio Northern Law Review, pp.121-143, Vol. 17, 1990.
54. Pou, Charles, Jr., "'Wheel of Fortune' or 'Singled Out?': How Rosters 'Matchmake' Mediators," Dispute Resolution Magazine, pp.10-13, Spring 1997.
55. Pou, Charles, Jr., "Reauthorized Laws Show Government's ADR Comfort Level is Increasing," Alternatives, pp.15-23, Vol. 15, February 1997.
56. Reston, C., (Col.) U.S. Army Contract Appeals Division, Phone Interview, November 18, 1996.
57. Riskin, Leonard, "Mediator Orientations, Strategies and Techniques," Alternatives, pp.111-114, Vol. 11, September 1994.
58. Riskin, Leonard, "Understanding Mediator's Orientations, Strategies and Techniques; A Grid for the Perplexed," Harvard Negotiation Law Review, pp.7-49, Vol. 1, Spring, 1996.
59. Robertory, R.J. and Gomez, R.J., "Preparing for ADR," ADR Report, pp.6-8, Vol. 1, May 14, 1997.
60. Rosenberg, Joshua D. and Folberg, H., "Symposium on Civil Justice Reform: Alternative Dispute Resolution," Stanford Law Review, pp.2-65, Vol. 46, July, 1994.
61. S.1224 The Administrative Dispute Resolution Act of 1995; Hearing Before Subcommittee on Oversight of Government Management and the District of Columbia, 104th Congress, 1st Sess., 1994.
62. Shaw, Margaret L., "Alternative Dispute Resolution: How to Use It to Your Advantage," American Law Institute, pp.757-781, December 15, 1994.

63. Silver, Carol, "Models of Quality for Third Parties in Alternative Dispute Resolution," Ohio State Journal on Dispute Resolution, pp.37-85, Vol. 12, 1996.
64. Stipanowich, T.J., "Beyond Arbitration: Innovation and Evolution in the United States Construction Industry," Wake Forest Law Review, pp.65-179, Vol. 31, Spring, 1996.
65. Strong, Elizabeth, "Nuts and Bolts of ADR for Business Disputes," @<http://www.ljx.com>, April 2, 1997.
66. Stulberg, Joseph B., "Facilitative Versus Evaluative Mediator Orientations: Piercing the 'Grid' Lock," Florida State Law Review, pp.985-1005, Vol. 24, 1997.
67. "The Navy's ADR Program: Resolving Disputes by Managing Conflicts," @<http://www.ogc.secnv.hq.navy.mil>, July 3, 1997.
68. United States Air Force, Office of General Counsel, Guidelines for Using Alternative Dispute Resolution Techniques to Reduce Contract Disputes, June, 1994.
69. United States Army Corps of Engineers, Pamphlet 3, Mediation, September, 1991.
70. United States Army Corps of Engineers, Case Study #7, January, 1992.
71. United States Congress, Administrative Dispute Resolution Act, Law 101-552, 101st Congress, 2nd Sess., 1990.
72. United States Congress, Administrative Dispute Resolution Act, Law 104-320, 104th Congress, 2nd Sess., 1996.
73. United States Congress, Federal Acquisition Streamlining Act, Law 103-355, 103rd Congress, 2nd Sess., 1994.

74. VanLuit, F.M., "Alternative Dispute Resolution: A Case Analysis of a Negotiated Settlement." Mater's Thesis, Naval Postgraduate School, California, June 1994.

75. Wilkoff, M., Office of the General Counsel, Department of the Navy, Phone Interview, November 22, 1996.

76. Woods, Robert E. and Deuncy, John L., "A Guide to Dispute Resolution for Business," @http://www.hg.org, April 23, 1997.

# INITIAL DISTRIBUTION LIST

1. Defense Technical Information Center ..... 2  
8725 John J. Kingman Road, Suite 0944  
Fort Belvoir, VA 22060-6218
2. Dudley Knox Library ..... 2  
Naval Postgraduate School  
411 Dyer Road  
Monterey, CA 93943-5101
3. Director, Training and Education ..... 1  
MCCDC, Code C46  
1019 Elliot Rd.  
Quantico, VA 22134-5027
4. Director, Marine Corps Research Center ..... 1  
MCCDC, Code C40RC  
2040 Broadway Street  
Quantico, VA 22134-5107
5. Director, Studies and Analysis Division ..... 1  
MCCDC, Code C45  
300 Russel Rd.  
Quantico, VA 22134-5130
6. Marine Corps Tactical Systems Support Activity ..... 1  
Technical Advisory Branch  
Attn: Maj. J.C. Cummiskey  
Box 555171
7. Marine Corps Representative ..... 1  
Naval Postgraduate School  
Code 037, Bldg. 234, HA-220  
699 Dyer Road  
Monterey, CA 93940
8. Defense Logistics Studies Information Exchange ..... 1  
U.S. Army Logistics Management College  
Fort Lee, VA 23801-6043

9. Prof. David V. Lamm (Code SM/Lt) ..... 3  
Naval Postgraduate School  
Monterey, CA 93943-5103
10. Prof. Mark W. Stone (Code SM/St) ..... 1  
Naval Postgraduate School  
Monterey, CA 93943-5103
11. Capt. Michael C. Christian ..... 1  
661 Tanger Ave.  
Franklinville, N.J. 08322



DUDLEY KNOX LIBRARY  
NAVAL POSTGRADUATE SCHOOL  
MONTEREY CA 93943-5101

DUDLEY KNOX LIBRARY



3 2768 00342063 9